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No. 15-118

In the Supreme Court of the United States

JESUS C. HERNANDEZ, *ET AL.*,

Petitioners,

v.

JESUS MESA, JR.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF APA WATCH IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

In *Boumediene v. Bush*, this Court held that the Constitution's extraterritorial application "turn[s] on objective factors and practical concerns," not a "formal sovereignty-based test." 553 U.S. 723, 764 (2008). That holding is consistent with Justice Kennedy's concurrence two decades earlier in *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), rejecting four Justices' formalist approach to extraterritorial application of the Fourth Amendment's warrant requirement.

The questions presented are:

1. Does a formalist or functionalist analysis govern the extraterritorial application of the Fourth Amendment's prohibition on unjustified deadly force, as applied to a cross-border shooting of an unarmed Mexican citizen in an enclosed area patrolled by the United States?

2. May qualified immunity be granted or denied based on facts – such as the victim's legal status – unknown to the officer at the time of the incident?

3. May the claim in this case be asserted under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971)?

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INTEREST OF *AMICUS CURIAE*

Amicus curiae APA Watch[1] is a nonprofit association dedicated to ensuring that federal, state, and local agencies act within their substantive authority, consistent with applicable procedural requirements. Judicial review – both in retrospective damages claims as here and for prospective equitable or declaratory relief – enables the public to enforce the substantive limits on governmental authority. Trans-border actions, such as the unfortunate shooting here, pose important questions of precisely *which* country's

[1] *Amicus* files this brief with the consent of all parties, which all have lodged blanket letters of consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

substantive and procedural limits apply to resolving these important issues. For that reason, *amicus* APA Watch has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The parties are divided – and the record unclear – on what preceded the fatal shooting here. *Compare* Pets.' Br. at 2-4 *with* Fed'l Resp.'s Br. at 3. *Amicus* APA Watch has no idea whether the victim – Sergio Hernandez – was a child playing, involved in criminal activity, or simply caught in crossfire. Nonetheless, this *amicus* brief assumes *arguendo* the plaintiffs' side of the factual story because the Border Agent – Jesus Mesa, Jr. – clearly would prevail if this case were remanded for trial and the evidence bore out his version of the facts. In summary, this brief assumes that, while standing in Texas, Agent Mesa shot Hernandez – a Mexican national not connected to the U.S. – for no reason, while Hernandez was standing in Mexico.

If Hernandez were a U.S. citizen or if he had been standing in the United States, his parent's version of the story would trigger rights under the Fourth and Fifth Amendments of the U.S. Constitution, which of course "shall be the supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Although this Court historically tied the Constitution to "the Land" of this Nation and its citizens, *U.S. v. Belmont*, 301 U.S. 324, 332 (1937) ("our Constitution, laws, and policies have no extraterritorial operation, unless in respect of our own citizens"); *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909) ("the general and almost universal rule is that the character of an act as lawful

or unlawful must be determined wholly by the law of the country where the act is done"), the Court more recently has considered the extraterritorial coverage of constitutional protections. *See, e.g.*, *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990); *Boumediene v. Bush*, 553 U.S. 723, 732 (2008). In addition to plumbing these extraterritorial issues further, this litigation also presents the questions of whether Agent Mesa can assert qualified immunity here and whether the Hernandez family can assert an action under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

SUMMARY OF ARGUMENT

With regard to the first two questions presented – namely, the Constitution's reach and the relevance of whether Agent Mesa knew that Hernandez was not a citizen and thus not protected as such – this Court need not resolve these questions for two reasons. First, this case can and should be resolved as a diversity case under Mexico's substantive law (Section I.C). Significantly, the exclusivity clause in 28 U.S.C. §2679(b)(1) of the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA") does not preclude the use of Mexican law in a diversity action because the *entire* FTCA does not apply here, by its express terms (Section I.B.2). For its part, the *Bivens* analysis encourages courts to consider alternative remedies (Section I.B.1). With regard to both of the first two questions presented, the constitutional-avoidance doctrine therefore argues for this Court not to decide the constitutional questions presented.

In essence, the three questions presented boil down to the final question presented: does a *Bivens*

remedy lie here? Because law enforcement officers such as Agent Mesa would be immune under Mexican law, the plaintiffs cannot pursue a Mexican-law suit under diversity jurisdiction in a Texas court, but the same determination by Mexico to bar such suits is due deference from this Court with regard to creating a *Bivens* action there (Section III.C). By the same token, when another country – say, Canada – allows such suits to go forward under its own laws, those suits also could go forward in U.S. courts as diversity suits under a choice-of-law analysis that implicated Canadian law. Essentially, this Court should defer to the national decisions of the nations that are most directly involved in considering a *Bivens* action.

Significantly, this Court's reliance on federal-question jurisdiction in *Bivens* and its progeny should guide this Court to recognize that the Congresses that enacted our subject-matter-jurisdiction statutes did so under the firm rule that the Constitution did not apply abroad. *See, e.g.*, *Belmont*, 301 U.S. at 332; *United Fruit*, 213 U.S. at 356. Accordingly, those statutes – 28 U.S.C. §§1331, 1332 – should be read as arguing against an extraterritorial Constitution and for using foreign law when appropriate in diversity actions (Section III.A). Finally, the border-control and immigration contexts at issue here require this Court's deference to acts of Congress, over a judicial expansion of the scope of the Constitution (Section III.B).

ARGUMENT

I. THE EXTRATERRITORIAL REACH OF THE CONSTITUTION NEED NOT BE RELEVANT TO CROSS-BORDER TORTS OF FEDERAL OFFICERS.

The first question presented concerns the proper mode for analyzing the extraterritorial application of the Fourth and Fifth Amendments. Because this litigation does not require a response to that question, this Court should not answer it: the plaintiffs can bring a foreign-law claim in U.S. court, which is all the relief to which they are entitled.

A. The canon of constitutional avoidance should lead this Court to assess choice-of-law tests before parsing the scope of the Constitution's coverage.

The petitioners ask this Court to construe arcane tests – formalist versus functional analyses – that appear nowhere on the face of the Constitution, but nonetheless go to the Constitution's substance. Under the doctrine of constitutional avoidance, federal courts first should attempt to resolve the issue without resort to the Constitution. *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2247, 2258-59 (2013). Here, that resolution easily lies by considering whether plaintiffs have a claim under the law of the jurisdiction in which the decedent suffered injury. In essence, this is simply a diversity-jurisdiction case, 28 U.S.C. §1332,[2] where

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[2] "[I]t is facially apparent that each plaintiff's wrongful death claim satisfies the amount in controversy requirement." *Menendez v. Wal-Mart Stores, Inc.*, 364 F. App'x 62, 67 (5th Cir. 2010).

the choice-of-law analysis tips to using Mexican law to determine whether Agent Mesa is liable to plaintiffs.

In situations – such as detentions at Guantanamo Bay – with no other law to apply because no other sovereign has an interest, *see, e.g.*, *Boumediene v. Bush*, 553 U.S. 723, 770-71 (2008), this Court must consider the petition's formalist-vs.-functional divide, *id.* at 764. By contrast, in a standard cross-border tort such as the one presented here, the proper resolution can lie under diversity jurisdiction, as informed by foreign substantive law, limited as needed by our due-process protections.[3]

B. *Bivens* mandates a search for alternate remedies, and FTCA poses no obstacle to basing foreign torts on foreign law.

The three questions presented – *i.e.*, choice-of-law versus constitutional extraterritoriality, immunity, and the availability of a *Bivens* action – are inter-related facets of the same basic inquiry of whether the plaintiffs can sue. Importantly, neither *Bivens* nor the FTCA *precludes* the alternate answer to that core question that *amicus* APA Watch proposes here.

1. *Bivens* requires searching for alternate remedies.

Although *amicus* APA Watch addresses whether a *Bivens* action is available here in Section III, *infra*, one thing is clear: *Bivens* would not *preclude* a cause of action under Mexican substantive law. To the contrary, this Court's *Bivens* analysis asks whether

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[3] As explained in Section III, *infra*, no due-process limitations apply here because Mexican law provides the plaintiffs no rights, and thus there is no *Bivens* remedy.

other forms of relief are available as part of analyzing whether to allow a *Bivens* remedy:

> In the first place, there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.

Wilkie v. Robbins, 551 U.S. 537, 550 (2007). Whether it applies or not, *Bivens* itself certainly does not limit a plaintiff's available remedies.

2. FTCA does not preclude searching for alternate remedies.

Although *Minneci v. Pollard*, 565 U.S. 118, 126 (2012), cites the FTCA for the proposition that one "ordinarily cannot bring state-law tort actions against employees of the Federal Government," *id.* (emphasis omitted) (*citing* 28 U.S.C. §§2671, 2679(b)(1)),[4] that proposition does not apply to situations to which the FTCA itself does not apply:

> *The provisions of this chapter ... shall not apply* to—
>
> ...
>
> (k) Any claim arising in a foreign country.

28 U.S.C. §2689(k) (emphasis added). Because FTCA's exclusivity clause is every bit as much a part of "this chapter" (*i.e.*, the FTCA) as FTCA's foreign-country exception, the FTCA's bottom line for claims that arise

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[4] Under 28 U.S.C. §2679(b)(1), the FTCA remedy against the United States "is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim[.]"

in foreign countries is that the *entire* FTCA does not apply. In short, neither FTCA's remedy nor FTCA's exclusivity applies here. That leaves plaintiffs free to resort to alternate legal theories, including the ones outlined here.

Although the inapplicability of FTCA's exclusivity clause is obvious from the plain language of FTCA, the same result would flow from the canon against repeals by implication: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original, interior quotations and citations omitted). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (internal quotations omitted). Because the alternate action proposed here existed when Congress enacted the FTCA, this Court should not presume that Congress intended to supplant that remedy *sub silentio*, without replacing it.

C. The plaintiffs could sue Agent Mesa in Texas under Mexico's substantive law.

This Court must perform a difficult balancing act when Congress has neither provided nor precluded a remedy for constitutional injury. *Bush v. Lucas*, 462 U.S. 367, 373 (1983). In this case, however, Congress has provided diversity jurisdiction, 28 U.S.C. §1332, and federal courts can easily determine whether to apply U.S. – *i.e.*, federal or state – law or Mexican law. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 709 (2004) (*citing* RESTATEMENT (SECOND) OF TORTS §145). As the

Sosa court explained, however, the states' choice-of-law tests differ, and – whatever the test – can end up picking foreign law. *Id.* Under these circumstances, *amicus* APA Watch respectfully submits that federal courts would benefit from a uniform rule of decision for choice-of-law issues in cross-border cases.

1. In the absence of congressional action, this Court should adopt a rule of decision for choice-of-law issues in cross-border torts.

In *Sosa*, this Court rejected the argument that the FTCA should use a "headquarters rule" in cases where that rule would not result in applying foreign law:

> [T]he result of accepting headquarters analysis for foreign injury cases in which no application of foreign law would ensue would be a scheme of federal jurisdiction that would vary from State to State, benefiting or penalizing plaintiffs accordingly. The idea that Congress would have intended any such jurisdictional variety is *too implausible to drive the analysis* to the point of grafting even a selective headquarters exception onto the foreign country exception itself.

Sosa, 542 U.S. at 711-12 (emphasis added). At least until Congress acts to set its own rule of decision in such cases, this Court should not allow this Nation's outward-facing legal system *vis-à-vis* other nations to hinge on the vagaries of state-by-state choice-of-law rules.

Notwithstanding that "when there is little need for a nationally uniform body of law, state law may be

incorporated as the federal rule of decision," *U.S. v. Kimbell Foods, Inc.*, 440 U.S. 715, 728 (1979); *accord Empire Healthchoice Assur., Inc. v. McVeigh*, 547 U.S. 677, 691-92 (2006) ("prudent course ... is often to adopt the ready-made body of state law as the federal rule of decision until Congress strikes a different accommodation") (internal quotation omitted), such inconsistencies are – per *Sosa*, *supra* – simply "too implausible to drive the analysis" here. Instead, "[a] single nationwide rule would be preferable to one turning on state law." *West Virginia v. U.S.*, 479 U.S. 305, 309 (1987). Without any applicable congressional action, this Court should apply the Restatement test.

2. This Court should apply Mexican law to evaluating plaintiffs' claims.

Under the Restatement test proposed above and adopted by the vast majority of states, *Sosa*, 542 U.S. at 751 (Ginsburg, J., concurring in part and concurring in the judgment), choice of law depends not only on where the parties live, where the tort takes place, and where the injury is felt, but also on which jurisdiction has the most significant relationship to the occurrence and the parties. *Compare* RESTATEMENT (SECOND) OF TORTS §145(2)(a)-(c) *with id.* §145(1). The relationships between the shooting and Mexico versus the United States depends in large part on which set of facts – Agent Mesa's or the plaintiffs' – is accurate. Because Agent Mesa would be held liable only if the plaintiffs proved their rouge-agent theory (*i.e.*, if Agent Mesa's actions were reasonable, liability clearly would not attach), *amicus* APA Watch thus assumes *arguendo* that the plaintiffs will establish their set of facts in order to evaluate liability under

the facts most favorable to plaintiffs. *Land v. Dollar*, 330 U.S. 731, 735 (1947) (merits and threshold issues that "intertwine" can be handled together). Under the plaintiffs' set of facts, Mexico clearly has the greater interest in an unjustified shooting of a Mexican citizen standing in Mexico.

Amici Mexican jurists, practitioners, and scholars explain Mexican law in cases like this, where a victim or the victim's estate has a right to reparations based on a criminal act. Jurists' Br. at 4-5. Either a criminal court or a civil court can resolve reparations, either as part of the criminal trial or as an independent civil action. *Id.* at 5-9. Significantly, however, both types of Mexican court would act only over someone within their jurisdiction or, in the case of the civil courts, one domiciled there. *Id.* That said, nothing would preclude a U.S. district court sitting in diversity jurisdiction from applying substantive Mexican law as described by *amici* jurists, practitioners, and scholars.

II. AGENT MESA'S KNOWLEDGE OF HERNANDEZ'S CITIZENSHIP HAS NO BEARING ON IMMUNITY UNDER MEXICAN LAW.

The second question presented asks whether the availability of qualified immunity can hinge on facts – such as the victim's citizenship – that were unknown to the officer at the time of the incident. Specifically, the victim here could have been a U.S. citizen and thus protected by the U.S. Constitution both at home and abroad; if so, the plaintiffs could sue Agent Mesa under *Bivens* for violating the victim's constitutional rights, without the formalist-vs.-functionalist inquiry into the Constitution's extraterritorial reach. Under

this argument, immunity should not hinge on issues – *e.g.*, citizenship – unknown to the officer when he acted. Pets.' Br. at 27-33. While relevant to liability *under U.S. law*, this inquiry is irrelevant to liability *under the foreign law* of the jurisdiction where the tort occurred. If it accepts this analytical rationale, this Court will not need to resolve this constitutional issue, either, *see* Section I.A, *supra*, which effectively makes the entire case hinge on the *Bivens* question in Section III, *infra*.

While it is an interesting question under U.S. law whether a victim standing in Mexico possibly might hold U.S. citizenship (and so also hold constitutional protection vis-à-vis U.S. officers), it is not a question that this Court need answer. Whatever the victim's citizenship, he would be protected by the law of the jurisdiction in which the shooting occurred (*i.e.*, Mexico). Even if a shooter did not know the laws of Mexico, ignorance of the law would be no excuse; it is enough to fire knowingly into another jurisdiction, without regard for what the laws might be in the other jurisdiction.

While the unknown-citizenship issue is relevant to a qualified-immunity analysis under U.S. law, it simply disappears when this Court considers the case under Mexican law: "if it is not necessary to decide more, it is necessary not to decide more." *Citizens United v. FEC*, 558 U.S. 310, 375 (2010) (Roberts, C.J., concurring) (internal quotations omitted); *Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) (same). Given the constitutional overlay here, the duty to avoid deciding the question is all the more

pressing. *See* Section I.A, *supra*. Accordingly, *amicus* APA Watch respectfully submits that this Court need not decide the second question presented.

Quite simply, Agent Mesa shot someone standing in Mexico, and he could face the consequences of that action under Mexican law, regardless of what he knew or did not know.[5] "We have long recognized ... that ignorance of the law will not excuse any person, either civilly or criminally." *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 581 (2010) (interior quotations omitted). Because "'I thought it was legal' is no defense," *Commil USA, LLC v. Cisco Sys.*, 135 S.Ct. 1920, 1930 (2015), we can assume liability *arguendo* under Mexican law without resolving the trickier qualified-immunity issue under U.S. law. At that point, the real question presented – namely, can plaintiffs sue? – boils down to the related issues of immunity or the viability of a *Bivens* action.[6]

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[5] Of course, if Agent Mesa's use of deadly force was justified under U.S. law – or international law or Mexican law – because the victim was engaged in drug smuggling or other illegal border actions, that could absolve Agent Mesa. The point here is analyze the case *arguendo* under the plaintiffs' allegations.

[6] Although *amicus* APA Watch would argue that foreign-law-based liability should hinge on foreign-law-based immunity, this Court can reach the same result by considering foreign immunity issues in connection with the *Bivens* issue in Section III.C, *infra*.

III. THE AVAILABILITY OF A *BIVENS*-STYLE ACTION FOR CROSS-BORDER TORTS HINGES ON WHETHER A PLAINTIFF CAN SUE FEDERAL OFFICERS UNDER FOREIGN LAW FOR ANALOGOUS TORTS.

As framed in the questions presented, the third and final inquiry is whether the plaintiffs can bring a *Bivens* claim (*i.e.*, whether the plaintiffs have a cause of action against Agent Mesa for violating the Fourth and Fifth Amendments, with no qualified immunity to protect him). As *amicus* APA Watch would frame it, the Court must engage in a *Bivens*-like immunity analysis to see whether the plaintiffs can bring a tort action under Mexican substantive law in a U.S. court (*i.e.*, neither the U.S. Constitution nor qualified immunity would be relevant here). Under either framing analysis, the dispositive question boils down to *Bivens*.

Both because this Court can read the federal subject-matter jurisdictional statutes to preclude an extraterritorial application of the Constitution and because Congress has allowed enforcement of foreign substantive law in our federal courts, the first "special factors counselling hesitation" are the jurisdictional statutes themselves. 28 U.S.C. §§1331, 1332. Second, the border-control or immigration-control nexus in which Agent Mesa operated provides another factor that counsels this Court to stay its hand, as it has in the military context. Finally, the fact that Mexico – the foreign country at issue here – has immunized the type of officers involved here from its civil-liability laws requires this Court to stay its hand, lest it create

operational dangers for federal officers operating with Mexican officials in Mexico.

A. This Court lacks implicit congressional authorization from the subject-matter jurisdiction statutes.

This Court's *Bivens* process relies in part on the need for a federal remedy, given the federal courts' subject-matter jurisdiction over federal questions. *Schweiker v. Chilicky*, 487 U.S. 412, 420-21 (1988); *Bivens*, 403 U.S. at 398-99 (Harlan, J., concurring in the judgment). When Congress first created federal-question in 1875, the Constitution did not apply extra-territorially, *Belmont*, 301 U.S. at 332; *United Fruit*, 213 U.S. at 356, which lends a restricting interpretation on the federal-question statute that Congress enacted: "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957); *accord Nat'l Ass'n of Home Builders*, 551 U.S. at 662. Quite simply, §1331 as enacted does not support extraterritoriality, and §1332 authorizes federal courts to import foreign law for foreign torts, further undermining the need for an extraterritorial Constitution.

This Court previously has accepted prior decisions as limiting the seemingly-broad scope of the subject-matter jurisdiction statutes:

> Whatever Article III may or may not permit, we thus accept the *Barber* dictum as a correct interpretation of the Congressional grant [in 28 U.S.C. §1332].

Ankenbrandt v. Richards, 504 U.S. 689, 700 (1992). A similar reading here should convince this Court that Congress did not authorize this Court's foray into an extraterritorial Constitution. Quite the contrary, for cases like the one here, Congress directed the courts to resolve such cases with diversity jurisdiction and choice-of-law analyses.

B. The border-control and immigration contexts are special factors that weigh against finding *Bivens* liability, at least as to *Bivens* liability that would impose different standards for U.S. officers and their Mexican counterparts.

Although perhaps not as commanding as military affairs – to which this Court has declined to extend a *Bivens* remedy, *see Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *U.S. v. Stanley*, 483 U.S. 669, 681 (1987) – the border-control and immigration contexts at issue here also counsel for this Court to defer to Congress to create rights here. Indeed, this Court's actions to extend constitutional remedies here might harm U.S. officers' ability to work cooperatively with Mexican counterparts in law enforcement on border issues. If the community there realizes that Mexican officers are immune, while U.S. officers are not, focus and fire will be directed to U.S. officers.

Finally, if cases like these are resolved as damage actions under foreign law, courts will not be setting a constitutional norm with each case. Unlike decisions in *Bivens* suits, damage judgments under Mexican law will not – or at least *need not* – constrict border-control policy prerogatives.

C. Courts must import foreign immunity law with foreign substantive law.

In addition to advising this Court about the contours of substantive Mexican law for the plaintiffs' claims against Agent Mesa, *see* Section I.C.2, *supra*, *amici* Mexican jurists, practitioners, and scholars also advise this Court that officers like Agent Mesa would be immune from civil liability under Mexican law. *See* Jurists' Br. at 9-11. This Court already has held that Mexican-law suits in Texas-based federal courts must import the exclusions from suit along with the cause of action. *Slater v. Mexican Nat'l R. Co.*, 194 U.S. 120, 126-27 (1904). As the Court put it in *Slater*:

> It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose.

Id. at 126. That injustice precludes a choice-of-law selection for foreign law without also importing the foreign law of immunity. Thus, the plaintiffs cannot pursue a foreign-law suit even though the same action by a border agent at the Canadian border might prove liable – assuming *arguendo* that Canada's immunity laws are more favorable to victims – even though no liability lies in the Mexican context.[7]

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[7] This divergence would not be "racist" but rather a reflection of the legal traditions of Mexico and Canada. For example, many Caribbean islands have populations of predominantly African descent, but nonetheless share Canada's legal traditions, owing to their – and our – common colonial history and English law.

Although *Slater* directly resolves only the foreign-suit approach that *amicus* APA Watch has proposed, it also informs the non-viability of the *Bivens* action for U.S. constitutional violations that this Court asked the parties to address. A *Bivens* suit is not a human or international right. While some sovereigns are more generous with relief for governmental injury, others – including Mexico here – are less generous. In a typical case, this Court takes its cues from what Congress has or has not enacted in a field, *see, e.g.*, *Bush v. Lucas*, 462 U.S. 367, 373 (1983). Here, the foreign government with sovereignty over the underlying tort allegations takes the place of Congress with respect to those tort allegations. That should give this Court pause to promulgate new rights, unsettling the rights that those closest to the issue have adopted. In a case – such as a Guantanamo Bay case – without an alternate sovereign's laws to apply, this Court has more leeway to act without intruding on other nations' sovereignty. Here, this Court can – and should – defer to Mexico on immunity.

CONCLUSION

Although this Court need not answer to first two questions presented here, the Court should affirm the dismissal of this action, either on Mexican-law grounds or because a *Bivens* action does not lie here.

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Respectfully submitted,

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